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No. 25 Org'l

IN THE

Supreme Court of the United States

STATE OF NORTH DAKOTA, EX REL. WILLIAM LEMKE, ATTORNEY GENERAL, *Plaintiff*,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO., GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, *Defendants*.

PETITION FOR LEAVE TO FILE AMENDMENT TO ORIGINAL BILL.

To the Judges of the
Supreme Court of the United States:

Now comes the State of North Dakota, by its Special Counsel, Karl Knox Gartner, and petitions this Honorable Court for leave to file an amendment to its original bill tendered for filing at a session of this Court held May 16, 1921.

KARL KNOX GARTNER,
Special Counsel,
701-6 Woodward Building, Washington, D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

STATE OF NORTH DAKOTA, EX REL, WILLIAM LEMKE, ATTORNEY GENERAL, *Plaintiff*,

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO., GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, *Defendants.*

AMENDMENT TO ORIGINAL BILL.

To the Judges of the
Supreme Court of the United States:

Your oratrix, the State of North Dakota, Complainant, by William Lemke, Attorney General thereof, for amendment to its Original Bill against the above-named defendants previously lodged with this Court, states:

XXI.

That the said State of North Dakota owns and operates a flour mill and grain elevator of two million bushels capacity at Drake, North Dakota, and a three thousand barrel flour mill at Grand Forks, North Dakota, in addition to fifteen penal and educational institutions located at different points in the State; that in connection with the operation of said enterprises, the State ships over the lines of each of the defendants quantities of merchandise, coal, grain and other com-

modities for the transportation of which it pays freight charges to the defendants amounting to many thousands of dollars annually; that the State has in its employ numerous officials and employes whose official duties require them to travel extensively throughout the State; that such travel is on the trains of the defendants and must be paid for out of the State Treasury; that the State pays to the defendants for such travel several thousands of dollars annually; that the order of the Interstate Commerce Commission if the defendants are permitted to put same into effect will increase by 35 per cent the freight charges and by 20 per cent the passenger fare charges which the State pays annually to these defendants; that said increases are illegal and arbitrary as alleged in the Original Bill and are not supported by competent evidence submitted before said Commission.

XXII.

That under Section 15, Paragraph 2 of the Interstate Commerce Act (41 Stat L., 474), it is provided as follows:

> "(2) Except as otherwise provided in this act, all orders of the Commission, other than orders for the payment of money, shall become effective within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction."

That the order of the Interstate Commerce Commission, a copy of which is filed as Exhibit B to the Original Bill, is in pertinent part as follows:

> "*It is further ordered,* that this order shall become effective on or before June 10, 1921, and that respondents shall comply therewith upon not less than five days' notice to this Commission and to the general public by filing and posting tariffs in the manner prescribed in Section 6 of the Interstate Commerce Act, and that this order shall remain in force until the further order of the Commission in the premises."

XXIII.

That under the terms of the order of the Commission as quoted in Paragraph XXII the increased rates, fares and charges, which that order makes effective intrastate in North Dakota "shall remain in force until the further order of the Commission in the premises"; that if this order is permitted to become effective, all power of the State of North Dakota over its purely intrastate rates, fares and charges for transportation and travel intrastate will be forever abrogated in favor of the Federal power contrary to the provisions of the Constitution of the United States and that said order is for this further reason illegal and void.

XXIV.

That if the defendants are not restrained and enjoined from making effective the said order of the Interstate Commerce Commission, irreparable injury will be done the State; that the Interstate Commerce Act

does not authorize the Interstate Commerce Commission to make awards of reparation except in connection with interstate rates, fares and charges; and that there are no provisions under the laws of North Dakota for the recovery of the excessive or unreasonable charges authorized by the Interstate Commerce Commission in its said order; that, if the defendants are permitted to put the increased rates into effect, under color of authority therefor, and it should later be decided that the Interstate Commerce Commission was without authority to order such increases, but that its order was not supported by the evidence before it or otherwise illegal, there would be no way to recover the excessive rates, fares and charges paid by the State for the transportation rendered it and upon which it is dependent for the operation of its institutions and the travel of its officials and employes.

XXV.

That in the aforesaid proceeding before the Interstate Commerce Commission, in which the Commission made the order referred to in paragraph XVIII hereof, no evidence was introduced or before the Commission upon which it could lawfully be found by said Commission that the rates, fares and charges applicable to intrastate transportation within the State of North Dakota, imposed by authority of said State, caused any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; that the evidence before the

Commission in said proceeding does not support the findings made and set out in the Commission's report and order therein, copies of which are set out in Exhibit B; that the findings made by the Commission in said proceeding do not support the order therein made; that both said findings and said order were produced by a plain mistake of law on the part of the Commission; and that said order represents an attempted exercise by the Commission of power which it did not possess and constitutes no lawful authority to the defendants to disregard the rates, fares, charges, classifications, regulations, and practices applicable to the intrastate transportation of persons and property within the State of North Dakota lawfully imposed by the authority of said State.

WHEREFORE, your oratrix, the said State of North Dakota, does pray as before that this Honorable Court issue the appropriate process to restrain the defendants named herein from putting the said order of the Interstate Commerce Commission into effect; and that after due hearing an injunction be issued perpetually enjoining said defendants from executing said order and for such further and other relief as your oratrix may appear entitled.

At Washington, D. C., this 26th day of May, 1921.

WILLIAM LEMKE,
Attorney General,
State of North Dakota,

KARL KNOX GARTNER,
Special Counsel,
701-6 Woodward Building,
Washington, D. C.

I, Karl Knox Gartner, do swear that the matters alleged in the foregoing amendment are true to the best of my knowledge and belief.

KARL KNOX GARTNER.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 26th day of May, 1921.

CHARLES COLDEN MILLER.

(Seal)

My Commission expires January 15, 1925.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 25 Original.

STATE OF NORTH DAKOTA, ex rel., WILLIAM LEMKE, Attorney General,

Plaintiff.

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, AND NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

MOTION FOR LEAVE TO FILE OBJECTIONS.

Now come the defendants above named and move the Court for leave to file objections to plaintiff's motion for leave to file its original bill and for interlocutory injunction to stay other proceedings pending suit. The proposed objections of defendants are attached and herewith submitted.

CHARLES W. BUNN,

DENNIS F. LYONS,

BENJAMIN W. SCANDRETT,

Solicitors for Defendants.

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OBJECTIONS TO MOTION FOR LEAVE TO FILE ORIGINAL BILL AND ISSUANCE OF RESTRAINING ORDER.

Defendants object to the granting of plaintiff's motion for leave to file its original bill, and to the issuance of any process staying, pending this suit, the operation of the order of the Interstate Commerce Commission, for the following reasons:

I.

THIS IS A SUIT TO ENJOIN DEFENDANTS FROM EXECUTING AN ORDER OF THE INTERSTATE COMMERCE COMMISSION. BY STATUTE ALL SUCH SUITS MUST BE BROUGHT AGAINST THE UNITED STATES AND IN CERTAIN DESIGNATED DISTRICT COURTS. AN ORIGINAL SUIT, THEREFORE, WILL NOT LIE IN THIS COURT WHERE A STATE CANNOT SUE THE UNITED STATES.

Section 207 of the Code gave the Commerce Court exclusive jurisdiction over cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. The Act of October 22, 1913 (Chapter 32, 38 Stat. 219) transferred this exclusive jurisdiction to the several District Courts of the United States. That Act also provides that with certain exceptions such suits must be brought in the Judicial District "wherein is the residence of the party or any of the parties upon whose petition the or-

der was made." Section 208 of the Code requires that suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought against the United States. The Code, in addition to requiring that all such suits shall be against the United States, provides in Section 212 that the Attorney General shall have charge and control of the interests of the Government in all such cases.

The foregoing statutory provisions were considered in the case of *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493. That case was brought by certain carriers in the District Court for the Northern District of Illinois to enjoin the state authorities from obstructing the carriers in obeying an order of the Interstate Commerce Commission prescribing passenger fares within the State of Illinois. Cross bills were filed attacking the validity of the Commission's order, praying that it be set aside, and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. In discussing the cross bills, this Court said:

> "Passing the fact that they were presented as cross bills, it is apparent that in subject-matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code Secs. 208, 211; c. 32, 38 Stat. 219-220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here

the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn v. United States*, 123 U. S. 227, 232-233; *Schillinger v. United States*, 155 U. S. 163, 166. It therefore is certain that the cross bills could not be entertained in the Northern District of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross bill and an original bill. No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see *Denver v. New York Trust Co.*, 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 How. 386; *Reeside v. Walker*, 11 *How.* 272, 290; *DeGroot v. United States*, 5 Wall. 419, 431-433; *Carr v. United States*, 98 U. S. 433, 437; *Belknap v. Schild*, 161 U. S. 10, 16. Thus the cross bills as such had no better standing than they would have had as original bills.

The claim is made that in any event the cross bills should have been retained as to the

> defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature."

The Act of October 22, 1913, to which reference has already been made, provides that no interlocutory injunction suspending or restraining the enforcement of an order of the Interstate Commerce Commission shall be issued unless the application therefor shall be heard and determined by three judges. It also provides that such an application shall not be heard before at least five days' notice has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and such other persons as may be defendants in the suit. In cases of irreparable damage, a majority of the three judges may on three days' notice allow a temporary stay for not more than sixty days. Provision is made for a direct appeal to this Court from any order granting or denying such an interlocutory injunction and also from any final judgment or decree of the District Court in such a case. That Congress in creating the Commerce Court evidenced an intention to confine the jurisdiction of this court in cases in-

volving orders of the Interstate Commerce Commission to its appellate jurisdiction, was recognized in the case of *United States v. Baltimore & Ohio Railroad Co.*, 225 U. S. 306. It is there stated:

> "It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way."

The fact that the party seeking to enjoin the enforcement of the order of the Interstate Commerce Commission is the State of North Dakota does not make inapplicable the statutory provisions requiring that such a suit be brought against the United States in the District Court. It was settled as early as the case of *Ames v. Kansas*, 111 U. S. 449, that the original jurisdiction of the Supreme Court in cases where a state is a party is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a state to be brought in the inferior courts of the United States. It is also well settled that the United States cannot be sued without its consent (*Kansas v. United States*, 204 U. S. 331). From

this it necessarily follows that the United States can only be sued in those courts that are within the consent given (*United States v. Louisiana*, 123 U. S. 32; *Illinois Central Ry. Co. v. Public Utilities Commission*, 245 U. S. 493). It is true that Section 233 of the Code declares that:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of another state, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction."

In the case of *United States v. Louisiana, supra*, the Court after pointing out that the above declaration was a part of the Judiciary Act of 1789, states:

> "This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued

> in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none."

If, when enacted, this section had given this Court original and exclusive jurisdiction of a suit by a state against the United States, it would not have restricted the application of the present statute which requires that all suits against the United States to enjoin orders of the Interstate Commerce Commission be brought in the District Court.

It is not questioned that the original jurisdiction of this Court is conferred by the Constitution, and that consequently Congress cannot take it away. But unless the United States consents to be sued in this Court, that jurisdiction does not comprise suits against the United States whose consent to be sued is precedent to the jurisdiction of any court. Direct attack on the orders of the Interstate Commerce Commission is provided for in the statutes by an action to which the United States is a party and the Commission directly represented by the Attorney General. This suit, to which the Commission cannot be made a party, is an attempt to attack the order collaterally.

II.

BEFORE THE STATE PRESENTED ITS MOTION FOR LEAVE TO FILE ITS ORIGINAL BILL, THE NORTH DAKOTA CARRIERS BROUGHT A SUIT IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA AGAINST WILLIAM LEMKE, AND OTHER STATE OFFICIALS, AND AN ORDER WAS ISSUED RESTRAINING SUCH OFFICIALS FROM TAKING ANY ACTION TO OBSTRUCT THE CARRIERS IN COMPLYING WITH THE ORDER OF THE INTERSTATE COMMERCE COMMISSION. UNDER THE CIRCUMSTANCES, THIS COURT SHOULD NOT ENTERTAIN THE PLAINTIFF'S MOTION FOR LEAVE TO FILE ITS ORIGINAL BILL.

On May 10, 1921, the defendants, together with the Farmers' Grain and Shipping Company, a railroad corporation created under the laws of the State of North Dakota, filed their bill of complaint in the District Court of the United States for the District of North Dakota, against William Lemke, who is Attorney General of the State, and Frank Milhollan, C. W. McDonnell and W. H. Stutsman, who together constitute the Board of Railroad Commissioners of the state. That bill asked that the defendants be restrained from interfering with the carriers making effective the order of the Interstate Commerce Commission in its Docket No. 12085. On the same day an application for an interlocutory injunction was filed, requesting the

issuance of a temporary restraining order pending hearing by three judges, as required by Section 266 Code. This restraining order was issued by the District Court May 10, and served on all of the defendants May 12. The motion of the plaintiff for leave to file its original bill states that notice of the filing of said motion was given certain of defendants' counsel by letter dated May 9, 1921. The letters referred to were received by counsel for the Great Northern Railway Company and Minneapolis, St. Paul & Sault Sainte Marie Railway Company May 11, and by counsel for the Northern Pacific Railway Company, May 12. (The above facts are stated in the affidavit of D. F. Lyons which is presented with these objections). The motion for leave to file bill was presented May 16. From the foregoing it appears that the bill of the carriers was filed in the District Court and restraining order issued prior to the presentation of plaintiff's motion, and even prior to the receipt by the defendants of notice of the plaintiff's intention to apply to this Court for leave to file such a bill. No reference to the pendency of this prior suit is made in plaintiff's bill or motion, and it would seem that the pendency of that suit was not called to the attention of this Court by plaintiff in any way.

The restraining order issued in the suit in the District Court will only remain in effect until a hearing can be had before three judges, as required by Section 266 Code. That section provides that

this hearing before three judges shall be given precedence, and shall be in every way expedited. A direct appeal to this Court lies from any order of the three judges granting or denying the interlocutory injunction.

The case now pending in the District Court involves identically the same questions as are presented to this Court in plaintiff's original bill. While the parties technically are not the same, in that the State is not a party to the bill in the District Court, the parties for all practical purposes are the same, and every question here sought to be presented is involved in the prior suit. In addition it should be noted that one of the counsel who sign the original bill is a defendant in the case pending in District Court and was restrained from obstructing these plaintiffs in obeying the order of the Interstate Commerce Commission.

Under all the circumstances, we submit that this Court should not entertain the plaintiff's motion for leave to file an original bill.

III.

BY THE ORIGINAL BILL THE STATE OF NORTH DAKOTA IS SEEKING TO PROTECT ITS CITIZENS FROM DAMAGE WHICH IT IS CLAIMED WILL RESULT FROM THE ENFORCEMENT OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION. THERE IS NO CLAIM THAT ANY PROPERTY RIGHT OF THE STATE WILL BE AFFECTED BY ENFORCEMENT OF THE ORDER. SUCH A SUIT IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT.

The threatened damage on account of which the State seeks an injunction against the order of the Interstate Commerce Commission is stated in the original bill to be:

That the increased rates will result in a taking of the property of the citizens of the State of North Dakota without due process of law (paragraph X); that the increased rates will prevent jobbing businesses within the State of North Dakota from competing with jobbers located in the State of Minnesota (paragraph XVII); and that the increases will amount in the aggregate to approximately $6,000.00 per day to the shippers and travelers intrastate in the State of North Dakota (paragraph XX). There is no allegation or suggestion in the bill that any property right of the State of North Dakota will be affected by the enforcement of this order.

In the case of *Louisiana v. Texas,* 176 U. S. 1, Chief Justice Fuller said:

> "In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals."

If one state cannot sue another state in this Court in vindication of grievances of particular individuals, then it must follow that one state cannot sue any citizen or corporation in this Court in vindication of grievances of particular individuals. This was the holding in *Oklahoma v. A. T. & S. F. Ry. Co.,* 220 U. S. 277. In that case the State of Oklahoma sought to restrain the railroad from enforcing certain freight rates against the inhabitants of Oklahoma. After reviewing the case of *Louisiana v. Texas,* Justice Harlan states:

> "These doctrines, we think, control this case and require its dismissal as not being within the original jurisdiction of this court as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although, an injury, in violation of law, to the property or rights of par-

ticular persons through the action of foreign corporations or citizens of States could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured.

"We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally."

IV.

Lack of merits in the bill.

The order of the Interstate Commerce Commission under attack finds that the existing local rates in North Dakota result in unjust discrimination against interstate commerce, and directs that this discrimination be removed by an advance of such rates. The bill does not charge that this order is not supported by sufficient evidence, but the State's whole case rests on the assumption that the order was issued without authority of law. It is obvious that this assumption cannot be maintained. The history of the order, as disclosed by the bill, is as follows:

In the spring and summer of 1920 the Commission held extensive hearings under Section 15a of the Interstate Commerce Act, and on July 29, 1920, filed its report and order (*Ex Parte* 74, *Increased Rates* 1920, 58 I. C. C. 200). In its report the Commission, for the purposes set forth in Section 15a, divided the country into four groups, namely, the Eastern Group, the Southern Group, the Western Group, and the Mountain-Pacific Group. Certain increases were approved in the passenger and freight rates in each group, the increases in freight rates differing in the respective groups. In approving these increases, the Commission found that such increases

> "would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and ½ of 1 per cent in addition."

The North Dakota carriers, as well as the carriers throughout the United States, filed tariffs making effective on interstate traffic August 26, 1920, the increases authorized. After the carriers' application for similar increases in their intra-

state rates had been denied by the North Dakota Commission, the carriers petitioned the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act to institute an investigation to determine whether the intrastate passenger and freight rates in North Dakota were a discrimination against interstate commerce. Such a proceeding was instituted by the Commission under its Docket No. 12085, and after a hearing before an Examiner at Bismarck and argument before the full Commission at Washington, in both of which the State participated by counsel, the Commission on May 9 filed its report and order. In that report it found that the intrastate passenger and freight rates in North Dakota were lower than the corresponding interstate passenger and freight rates; that the maintenance of these lower passenger and freight rates resulted in undue prejudice to persons traveling in interstate commerce within the State of North Dakota and between points in the State of North Dakota and points in other states, in undue preference of and advantage to persons traveling intrastate in North Dakota, in undue preference of and advantage to shippers of intrastate traffic within the State of North Dakota, in undue prejudice to shippers of interstate traffic and in unjust discrimination against interstate commerce. The Commission further found that the increases made in the interstate rates pursuant to its decision in Ex Parte 74 result in reasonable

passenger and freight rates for interstate transportation, and ordered the carriers to remove the existing discriminations by making increases in their intrastate passenger and freight rates which will correspond with the increases theretofore made in the interstate passenger and freight rates. It is the enforcement of this order that the plaintiff in its original bill seeks to enjoin.

The principal attack made on the validity of the order is that the differences existing between the level of the intrastate rates in North Dakota and the level of the interstate rates were brought about by illegal advances of interstate rates. It is first claimed that these advances were unlawful because the Commission failed in its report to fix a value for the property of the carriers in the Western Group. There is no requirement in the Act that the Commission state in its report the value it uses as the basis of rates in any group. The Commission found that the increases approved would not yield more than a fair return upon the aggregate value of the property in the respective groups. This finding is not attacked, and moreover, is not open to attack in a collateral proceeding such as this, which is an attack on another order of the Commission.

The next ground of attack on the advance of interstate rates is that no notice was given the Governor of the State of any valuation upon which rates were to be based. There is no requirement in Section 15a that the Governor of any state be

notified before the Commission initiates rates under that section.

The only other ground advanced to prove illegality of the interstate rates is that the Commission's report and order is not founded upon the evidence discussed in its report. The Commission itself, on page 512 report, answered this contention. Moreover, the State does not in this connection charge that the finding of the Commission that the increases authorized will result in reasonable rates is unsupported by any testimony.

In addition, it is claimed that the order advancing the intrastate rates is invalid because of the carriers' failure to comply with certain provisions of the North Dakota law and because of the fact that the resulting rates in North Dakota will be higher than the present local rates in Minnesota. It is a sufficient answer to point out that the relation between the local rates in Minnesota and the local rates in North Dakota was not in issue in this proceeding, and that the authority of the Interstate Commerce Commission to remove a discrimination against interstate commerce is not restricted in any way by state laws.

The only other charges in the bill of complaint are general allegations that the Commission's order is *chiefly* based upon incompetent testimony, and that the North Dakota rates, if increased, will be higher than the rates from Minnesota jobbing points to North Dakota and will prevent North Dakota jobbers from competing with

Minnesota jobbers. In this connection it should be noted again there is no allegation that the Commission's order is not supported by competent testimony. Furthermore, the report of the Commission sets out in considerable detail much of the testimony which the Commission considered, while the bill does not even attempt to specify the nature of the testimony which it is claimed was incompetent. This report also shows that the advances in the local rates will simply bring those rates up to the level of the rates generally applicable between North Dakota and Minnesota. It is recognized in the report there are certain lower rates between North Dakota points and Minnesota terminals, such as Minneapolis and St. Paul, but these rates are not for many reasons fairly comparable with the local rates in North Dakota.

The report of the Commission, which is a part of the bill, shows that the order in question was issued after a full hearing, and after the most careful consideration, and that it is supported by competent testimony. Under such circumstances, we submit that the allegations of invalidity set forth in the bill are not of sufficient merit to justify the interposition of a court of equity. The bill does not present a case showing that the Commission's action was arbitrary or that it transcends the legitimate bounds of their authority. It is settled that only in such cases can the Commission's order be disturbed.

Certainly the circumstances disclosed by the bill are not such as to entitle the plaintiff to process staying, pending the suit, the operation of the Commission's order. In this connection it should be noted that if the operation of the order is stayed and it should later be determined that the stay should not have been granted, irreparable injury will have been done the defendants, for it is self-evident that there is no way in which these carriers could be reimbursed for the increased rates the order directs them to make effective. On the other hand, there is no showing that the plaintiff will be damaged in any way by enforcement of the order and no showing that the citizens of North Dakota cannot be secured in some other way against the damage to them by enforcement of the order, in event it should later be found improperly issued. Orders similar have been issued in a number of states and the District Courts in each instance have restrained the state officials from obstructing the carriers in complying with those orders. A number of these cases are now in this Court on appeal from decisions granting the carriers interlocutory injunctions. One of such cases, *Railroad Commission of Wisconsin, et al. v Chicago, Burlington & Quincy Railroad Co., et al.*, No. 694, October Term, has been submitted.

We ask that the plaintiff's motion for a stay of the order of the Interstate Commerce Commission and for leave to file its original bill be denied.

Respectfully submitted,

CHARLES W. BUNN,
DENNIS F. LYONS,
BENJAMIN W. SCANDRETT,
Solicitors for Defendants.

AFFIDAVIT.

STATE OF MINNESOTA,
County of Ramsey. ss.

D. F. LYONS, being first duly sworn, states that he is General Solicitor for defendant Northern Pacific Railway Company, and one of the counsel for the defendants in the above proceeding; that on May 10, 1921, the defendants, together with the Farmers' Grain and Shipping Company, a railroad corporation created under the laws of the State of North Dakota, filed their bill of complaint in the District Court of the United States for the District of North Dakota, against William Lemke, who is Attorney General of the State of North Dakota, and Frank Milhollan, C. W. McDonnell and W. H. Stutsman, who together constitute the Board of Railroad Commissioners of the State of North Dakota; that that bill of complaint asked that the defendants be restrained from interfering with the carriers' making effective the order of the Interstate Commerce Commission in its Docket No. 12085; that on the same day an application for an interlocutory injunction was filed, which requested the issuance of a temporary restraining order pending the hearing and determination of said application by three judges, as required by Section 266 of the Code; that this restraining order was issued by the District Court on May 10 and served on all of the defendants in

said case on May 12. A true copy of the restraining order issued in said case on May 10 is hereto attached, marked "Exhibit A." Affiant further states that the letters mentioned in the plaintiff's motion for leave to file bill were received by counsel for the Great Northern Railway Company and Minneapolis, St. Paul & Sault Ste. Marie Railway Company May 11, and by counsel for the Northern Pacific Railway Company May 12.

Further affiant saith not.

D. F. LYONS.

Subscribed and sworn to before me this 24th day of May, 1921.

F. J. GEHAN,
Notary Public, Ramsey County, Minn.
My commission expires Apr. 4, 1925.

EXHIBIT A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHWESTERN DIVISION.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY; FARMERS' GRAIN AND SHIPPING COMPANY; GREAT NORTHERN RAILWAY COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, AND NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiffs.

VS.

WILLIAM LEMKE, FRANK MILHOLLAN, C. W. MCDONNELL AND W. H. STUTSMAN,

Defendants.

TEMPORARY RESTRAINING ORDER.

The plaintiffs having filed their verified bill of complaint in the above entitled case, praying that the defendants and each of them, their successors in office, their servants, employes, agents and other parties acting under the control or authority of each of said defendants, be perpetually enjoined from commencing any suit or proceeding to en-

force Chapter 192, Laws of North Dakota for 1919, Chapter 199, Laws of North Dakota for 1907, and the order of the Board of Railroad Commissioners of North Dakota, made on the fifth day of April, 1921, and any other statutes of the state or orders of the Board of Railroad Commissioners, purporting to fix and establish freight and passenger rates and fares for local transportation within the State of North Dakota, and be further enjoined and restrained from bringing any action or proceeding of any sort whatsoever to hinder, obstruct or prevent the plaintiffs from complying with the order of the Interstate Commerce Commission made on the 9th day of May, 1921, in filing tariffs in conformity therewith or in charging and collecting the rates, fares and charges so authorized and provided in said tariffs, and the plaintiffs having presented to the undersigned District Judge of the United States District Court their application for an interlocutory injunction on the ground that said statutes of North Dakota and said orders of the Board of Railroad Commissioners are unconstitutional in conflict with the Act to Regulate Commerce, as amended, and the order of the Interstate Commerce Commission, made and entered on the 9th day of May, 1921, and having requested the undersigned Judge of the United States District Court as provided by statute, to call to his assistance two other judges to hear and determine said application, and having requested that a temporary restraining order be issued pending the hear-

ing and determination of said application for an interlocutory injunction, and it now appearing that irreparable loss and damage would result to the plaintiffs unless such temporary restraining order be granted, in that the plaintiffs would, by complying with said statutes of North Dakota and said order of the Board of Railroad Commissioners, be deprived of their property, or by failure to comply therewith, the plaintiffs, their agents, officers and employes would be subjected to multitudinous and vexatious suits, both for injunctive and mandatory or other relief and for fines and penalties, and said officers, agents and employes would be subjected to numerous arrests, suits and fines;

IT IS THEREFORE HEREBY ORDERED that the defendants William Lemke, Frank Milhollan, C. W. McDonnell and W. H. Stutsman, and each of them, be temporarily restrained until the plaintiffs' application for an interlocutory injunction be heard and determined by three judges, as provided by statute, from bringing any action or proceeding of any sort whatsoever to enforce said statutes of North Dakota and orders of the Board of Railroad Commissioners, on account of the plaintiffs putting into effect, charging and collecting within the State of North Dakota, intrastate rates, fares and charges established pursuant to the order of the Interstate Commerce Commission of May 9, 1921 in its Docket No. 12085 or doing any other act which would hinder, obstruct or prevent the plaintiffs from complying with the order of the Interstate Commerce Commission of

May 9, 1921, and from filing tariffs in conformity therewith and from charging and collecting the rates, fares, and charges so authorized and provided for in said tariffs, and

IT IS FURTHER ORDERED, that the plaintiffs be required to furnish to every passenger requesting the same a receipt showing the amount paid, the date of payment and the stations between which the ticket purchased is valid; and

IT IS FURTHER ORDERED, that a copy hereof be served upon each of the defendants and that from and after the date of service, each and all of said defendants shall observe and comply herewith.

Dated May 10th, 1921.

WILBUR F. BOOTH,
U. S. District Judge
by Assignment to North Dakota.

an order permanently enjoining the application of said order may be entered.

Respectfully submitted,

WILLIAM LEMKE,
Attorney General,
and
KARL KNOX GARTNER,
Special Counsel
for the State of North Dakota.

Karl Knox Gartner, being first duly sworn, states that the matters alleged herein are true to the best of his information and belief.

KARL KNOX GARTNER.

Subscribed and sworn to before me this 26th day of September, 1921.

C. LARIMORE KEELEY,
Notary Public.

My commission expires March 2, 1925.

be an undue burden upon interstate commerce is for it to be made to appear that said rates, fares and charges are confiscatory; That before the Commission can make a legal order requiring the removal of such discrimination it must find that the State rates, fares and charges applicable in North Dakota are confiscatory; That no such finding has been made nor can it be made because the carriers have failed to offer any proof upon which such a finding could be predicated, though some proof was offered by the State which clearly rebuts any impression to that effect; That there is no evidence therefore in the record before the Commission to support its order; That said order is therefore arbitrary and void in violation of the Constitutional inhibition that there shall not be deprivation of property without due process of law; That great and irreparable injury is resulting every day to the people of the State of North Dakota as well as to the State itself from the enforcement of this void and unconstitutional order;

WHEREFORE, because of the matters and things alleged in its Original Bill and in its amendment to its Original Bill which this Court permitted to be filed in its order of May 31, 1921, and because of the new and additional matters alleged herein, Your Oratrix, the State of North Dakota, renews its motion for a temporary restraining order and prays that so much of the order entered May 31, 1921, as denied its request for such a restraining order be revoked; that a temporary restraining order be forthwith entered commanding the defendants to cease exacting and applying the increased intrastate rates, fares and charges authorized by said void and unconstitutional order; that a hearing be had as soon as possible pursuant to which

merce Act by the Transportation Act of 1920 as set forth in Paragraph III of the Original Bill; That said provision conferring a power upon the Commission to remove "any undue or unreasonable or unjust discrimination against interstate commerce" is unconstitutional and that the order made pursuant thereto is unconstitutional and void; That the Federal authority over interstate commerce is derived solely from the Commerce Clause of the Constitution, being Section 7 of Article I thereof, which is as follows:

> "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

That this court has held that the power to "regulate" commerce among the several States comprehends necessarily the power to preserve such commerce from burdens which would destroy the thing to be regulated; That at most the Federal power can extend only to the removal of undue burdens upon interstate commerce; That for the said section 13 of the Interstate Commerce Act as amended and as quoted in paragraph III to be held to be constitutional, it must be found that "any undue or unreasonable or unjust discrimination against interstate commerce" tantamount to an "undue burden" upon interstate commerce; or That before any undue, unreasonable, or unjust discrimination can give a constitutional basis for an order by the Commission, it must be made to appear that such discrimination amounts to an undue burden; That the only way the whole body of North Dakota rates, fares and charges affected by said order of the Commission can be shown to

Office Supreme Court, U. S.
FILED
OCT 4 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

No. 25 Original.

STATE OF NORTH DAKOTA, ex rel, WILLIAM LEMKE, ATTORNEY GENERAL, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY CO. et al, Defendants.

SECOND MOTION TO AMEND ORIGINAL BILL.

Your oratrix, the State of North Dakota, by her counsel herein, moves the Court for leave to amend the Original Bill which this Court by order dated May 31, 1921, has allowed her to file, and states:

XXVI.

That the order of the said Commission set forth as Exhibit B to the Original Bill is based solely upon a finding of unjust discrimination against interstate commerce; That that finding was made pursuant to a provision added to Section 13 of the Interstate Com-

Office Supreme Court, U. S.
FILED
JAN 12 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 25 ORIGINAL.

STATE OF NORTH DAKOTA, EX REL., WILLIAM LEMKE, ATTORNEY GENERAL, *Plaintiff*,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, ET AL., *Defendant.*

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH DAKOTA ON MOTION TO DISMISS BILL.

KARL KNOX GARTNER,
Special Counsel,
For the State of North Dakota,
701-6 Woodward Bldg, Washington, D. C.

Of Counsel,
SVEINBJORN JOHNSON,
Attorney General, State of North Dakota.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 25 ORIGINAL .

STATE OF NORTH DAKOTA, EX REL, WILLIAM LEMKE ATTORNEY GENERAL, *Plaintiff*,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, ET AL *Defendant.*

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH DAKOTA ON MOTION TO DISMISS BILL.

At the argument had in this matter on January 4 this Court granted the State of North Dakota leave to file a supplemental brief on the questions raised by the Motion to Dismiss the Bill. This brief is tendered pursuant to that authority.

STATEMENT.

The Motion to Dismiss is predicated upon the theory that this suit is one which under Section 208 Judicial Code, must be brought against the United

States and that under that Section and in conjunction with the District Court Jursidictional Act (38 Statutes at Large 219, October 22, 1913) the United States can only be sued in such a case in the United States District Court and that this case cannot therefore be tried originally in this Court.

In reply to that position, it is the contention of the State of North Dakota:

1. That the original bill here involved is by a state against citizens of other states within the terms of the Federal Constitution, Article III, Chapter 2, pursuant to which the State of North Dakota has a right to prosecute this suit originally in this Court.

2. That neither the United States nor the Interstate Commerce Commission is a necessary party to this suit as no remedy is sought against either. The only remedy sought is an injunction against the railroads made defendants, requiring them to republish and charge the rates previously in effect for intrastate application in North Dakota and to refrain from charging rates other than those authorized by state authority except as otherwise might thereafter be ordered by competent authority, which injunction will afford all the relief sought.

3. That Section 208 of the Judicial Code together with the other sections of the Code, viz: 200 to 214 inclusive, relating to the establishment of the Commerce Court, were repealed by the District Court Jurisdictional Act.

4. That the provision in the District Court Jurisdictional Act relating to procedure had and could have had only the effect of saving those provisions of the Commerce Court Act (36 Statutes at Large 539) viz: Sections 4 and 5, which related to procedure, and to have saved such provisions as matters of procedure only.

5. That neither the procedure sections of the Commerce Court Act nor any of the sections of the Judicial Code, viz: 200 to 214, relating to the establishment of a Commerce Court, created a right of action against the United States or granted a consent on its part to be sued. That these provisions related solely to procedure or routine and simply had the effect of substituting the title United States in lieu of Interstate Commerce Commission in the captions to pleadings and that it is only as such, in any event, that these provisions can be held to have been carried over by the District Court Jurisdictional Act.

6. That at most, the District Court Jurisdictional Act created a jurisdiction in the U. S. District Courts which as respects suits by a state against citizens of other states, is simply concurrent with the original jurisdiction of this Court under Article III, Chapter 2 of the Federal Constitution.

7. That Congress may not by statute change the form of an action otherwise one between a state and citizens of another state cognizable by this Court upon original bill so as to divest the state of its constitutional right to proceed originally in this Court.

The identical contention now presented to the Court in support of the Motion to Dismiss has been heretofore presented to this Court in this case and decided adversely to the defendants now pressing this Motion to Dismiss.

This suit was begun by the filing of a Motion for Leave to File the Original Bill along with which was tendered the Original Bill. This motion was made at the May 16th, 1921, session of this Court. On the same day the defendants named in the bill made a "Motion for Leave to File Objections." The motion for leave to file and the motion for leave to file objections were received on the same day at the same time. If the Court will refer to these "Objections to Motion for Leave to File Original Bill and Issuance of Restraining Order," Section 1 thereof appearing on pages 3 to 9 inclusive, it will be found that that objection is identical even as to wording with the brief originally presented by the defendants in support of their motion to dismiss the bill of complaint, pages 3 to 9 inclusive.

On May 31, 1921, after having before it the Motion for Leave to file the Original Bill, the Original Bill and a petition for leave to Amend the Original Bill, together with the Objections to the Motion for Leave to file, the Court entered an order granting the State permission to file the Original Bill and the amendments as petitioned.

The order permitting the Original Bill to be filed, in the face of the Objections to the filing which were before the Court, can only have the effect of denying the contentions raised by those Objections and it must be plain that the contentions now before the Court on the Motion to Dismiss are identical with the contentions

that have heretofore been passed upon by the Court adversely to the contentions of the defendants.

Having passed upon these contentions previously in this case and in the exercise of its discretion having entered an order permitting the State to file its Original Bill, it would seem that this Court will be very reluctant to now dismiss the Original Bill at this stage of the proceedings.

ARGUMENT

I.

The Bill herein is filed originally in this Court pursuant to Article 3, Section 2 of the Federal Constitution, which is in pertinent part as follows:

> "Section 2. The Judicial Power shall extend to all cases * * * between a State and Citizens of another State. * * * In all Cases * * * in which a State shall be Party, the Supreme Court shall have original jurisdiction."

The suit here is by the State of North Dakota against certain railroad corporations, each and all of which are citizens of States other than North Dakota. The remedy sought in the original bill is an injunction against the railroads that are made defendants. Under the Federal Constitution, the State of North Dakota has a right to pursue that remedy originally in this Court.

II.

Neither the United States nor the Interstate Commerce Commission is a necessary party to this suit as no remedy is sought against either. The only remedy

sought in this suit is an injunction against the railroads made defendants, requiring them to republish and charge the rates previously in effect for intrastate application in North Dakota and to refrain from charging rates other than those authorized by state authority except as otherwise might thereafter be ordered by competent authority. Such an injunction will afford all the relief sought by the bill. Certainly the United States can't afford such relief and the Interstate Commerce Commission can't afford it. The only entities who can afford the relief sought are the railroad defendants and they, therefore, must be the only necessary parties to this suit.

Undoubtedly the Department of Justice or the Interstate Commerce Commission or both should be interested in this suit because aside from the legal questions of fundamental powers involved, as state versus Federal powers to regulate rates, there is incidentally brought in issue the sufficiency of a certain order of the Commission.

The interest that either the Department of Justice or the Interstate Commerce Commission should have in this case is such that renders both proper parties.

It is certainly not necessary for me to argue to this Court the legal significance of the difference between proper parties and necessary parties.

The Interstate Commerce Commission can make orders only against carriers subject to the Interstate Commerce Act (41 Statutes at Large, 474). It cannot make orders against shippers and it cannot make orders against the State of North Dakota.

The thing complained of here is certain railroad rates. Railroad rates are made applicable by tariffs.

The tariffs are the handiwork of the railroads, not the Commission. The railroads publish the tariffs, not the Commission. A change in rates such as is sought here can only be secured at the hands of the railroads. An injunction, therefore, against the Commission alone would be futile. On the other hand an injunction running exclusively against the railroads would be entirely sufficient and would accord complete relief.

Suppose the Court after a final submission of this case on the merits should decide that the State of North Dakota was entitled to an injunction restoring the rates in effect prior to the increase made by the defendants pursuant to the Commission's order. In order to make this injunction effective, this Court would not have to issue any process against the Interstate Commerce Commission or against the United States, because neither the Interstate Commerce Commission nor the United States could publish the tariffs that would have to be published in order to restore the previous rates. The only entities that could publish these tariffs are the railroads who are made defendants in this proceeding. And an injunction such as outlined at the outset of this section of the argument running against the defendant railroads alone would enable this Court to enforce a complete remedy upon the issues presented. As said by this Court in Minnesota v. Hitchcock, 185 U. S. 373, at page 387:

> "The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered."

There can be no question as to the authority of this Court to order the injunction against the defendant railroads that is sought by the original bill.

Something has been said about the public interest and that the United States must be made a party in order to represent the public interest. What interest does the State of North Dakota represent in this case if it does not represent the public interest? If there be any other public interest, let it intervene and be heard by all means. No relief is sought against these other public interests that seem to be *in nubebus*. Proper parties are they all no doubt if they show where their interest is and intervene, but certainly not necessary parties.

As to any public interest involved, we look upon this Court as the greatest bulwark in the land of the whole public interest—it is indeed the guardian of the national public interest. The public interest represented by the State of North Dakota is in no wise inimical to that national public interest which reposes in the bosom of this Court, for what is good for North Dakota is good for the whole public interest, and what is bad for North Dakota, unfair to North Dakota, is likewise a blot upon the whole public interest. Realizing that this great Court will adjudicate the issues presented by its bill in a full consciousness of this conception of its guardianship of the public interest is the one satisfaction that is left the sovereign State of North Dakota as it deigns to submit its sovereignty to review before this Court.

We submit that the United States cannot be a necessary party to this suit and that all parties are before the Court which are necessary to enable it to enforce a complete remedy upon the issues presented.

III.

This idea that the United States is a necessary party to this suit filed originally in this Court originated in the interpretation which counsel for the defendants have placed upon Section 208, Judicial Code.

In Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493, this Court, at page 504, said:

> "By statute such suits are required to be brought against the United States (Judicial Code, Paragraphs 208, 211; Chap. 32, 38 Statutes at Large, 219, 220)."

In that statement this Court was referring to suits involving orders of the Interstate Commerce Commission when brought in the U. S. District Courts. Chapter 32, 38 Statutes at Large, 219, 220, cited as authority for the statement is the District Court Jurisdictional Act.

A procedure prescribed for application in the District Courts, of course, can have no application to procedure to be observed in this Court in the filing of an original bill authorized by no less authority than the Constitution itself.

There is nothing in Illinois Central R. R. Co. v. Public Utilities Commission, *supra*, or in any other decision of this Court or in Section 208 or in any other provision of the Judicial Code or any other law of Congress that provides that the United States is a necessary party to a suit by a State against citizens of another State brought originally in this Court, even though such suit might involve the nullification indirectly of an order of the Interstate Commerce Commission. See Ames v. Kansas, 111 U. S. 449; U. S. v.

Louisiana, 123 U. S. 32; Minnesota v. Northern Securities Co., 184 U. S. 199; Minnesota v. Hitchcock, 185 U. S. 373; Skinner & Eddy Corp. v. U. S., 249 U. S. 557.

Section 208, Judicial Code relied upon, has, however, been repealed.

Sections 200 to 214 inclusive of the Judicial Code are the sections of the Judicial Code Act relating to the establishment of a Commerce Court.

The Commerce Court Act (36 Statutes at Large, 539), was approved June 18, 1910. The Judicial Code Act (36 Statutes at Large, 1087), was approved March 3, 1911. The Sections of the Judicial Code, namely, 200 to 214 inclusive, are drawn from the Commerce Court Act.

The Commerce Court Act and the provisions of the Judicial Code relating to the establishment of the Commerce Court were repealed by the District Court Jurisdiction Act (38 Statutes at Large, 219), approved October 22, 1913, passed as a part of the general deficiency bill of that date.

Lest there be any doubt that this latter statement is correct, the repealing section of the District Court Jurisdictional Act is quoted as follows:

> "The Commerce Court, created and established by the act, "An Act to Create a Commerce Court and to Amend the Act, entitled 'The Act to Regulate Commerce,' approved February four, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June 18, 1910, is abolished from and after December 31, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred and vested in the several district courts of the

> United States *and all acts or parts of acts in so far as they relate to the establishment of the Commerce Court are repealed.*"

Sections 200 to 214 inclusive of the Judicial Code Act were the only "parts of acts" relating to the establishment of the Commerce Court that could have been repealed by the provision of the District Court Jurisdictional Act above quoted.

The District Court Jurisdictional Act, to be sure, provided:

> "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court."

This provision, however, cannot have the effect of saving Sections 200 to 214 of the Judicial Code intact, because if it does keep these provisions of the Judicial Code in effect, then there was no "parts of acts" relating to the establishment of a Commerce Court which could have been repealed by the repealing provision of the District Court Act.

Some effect must be given to that repealing provision in so far as it relates to "parts of acts." If, therefore, the provision quoted relating to procedure in the District Court Act saves anything, it must be the provisions of the Commerce Court Act relating to procedure before the Commerce Court.

The Judicial Code Act is an act of Congress differing in no particular in so far as legislative authority is concerned from any other act of Congress. It may be repealed, therefore, in whole or in part just as any other act of Congress may be repealed. There is

nothing inherently sacred in the Judicial Code that sets it apart from other Acts of Congress and requires special repealing legislation before its provisions may be changed.

IV AND V.

After repealing "All acts or parts of acts" relating to the establishment of a Commerce Court, the District Court Jurisdictional Act provided:

> "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this act shall be the same as that heretofore prevailing in the Commerce Court."

The procedure to be observed before the Commerce Court was set out in the provisions of the Commerce Court Act. Sections 200 to 214 Judicial Code were taken from the Commerce Court Act and those sections were identical with corresponding sections of the Commerce Court Act. Granting that the Judicial Code sections were repealed, corresponding sections of the Commerce Court Act relating to procedure before that Court were necessarily retained by the procedure provision of the District Court Jurisdictional Act.

Section 3 of the Commerce Court Act is identical with Section 208 Judicial Code. It might be urged therefore that although Section 208 of the Judicial Code has been repealed, Section 3 of the Commerce Act is still in effect. The provisions of Section 3 of the Commerce Court Act will, therefore, be now examined.

Section 3 of the Commerce Court Act is as follows:

"Sec. 3. That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the commerce court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the commerce court otherwise than upon notice and after full hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the Attorney-General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application."

Since the District Court Jurisdictional Act provides specifically for the granting of injunctions against orders of the Commission by district courts, it will hardly be claimed that any but the first sentence of the section, if any of it, has been retained.

It is the language of the first sentence that is here relied upon by the defendants.

What is the import of the language.

> "That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States."

Undoubtedly that language means just what it says, viz.: suits in the Commerce Court to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall name the United States as defendant.

If this is a procedure provision it can mean no more. If it is any more than a procedure provision it is not retained by the procedure provision of the District Court Jurisdictional Act.

Sections 4 and 5 of the Commerce Court Act also relate to the procedure to be observed before the Commerce Court and are as follows:

> "Sec. 4. That all cases and proceedings in the Commerce Court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever though it has not been made a party, public interests are involved.
>
> Sec. 5. That the Attorney-General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United

States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action; Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits; Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaf-

fected by the action or non-action of the Attorney-General of the United States therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

In connection with these provisions of the Commerce Court Act, it is essential to note that no provision was made in the Act to Regulate Commerce now designated as the Interstate Commerce Act (41 Statutes at Large, 474), for a procedure relating to suits to enjoin orders of the Interstate Commerce Commission. That Act provided how orders of the Interstate Commerce Commission might be enforced, but there is no provision in that Act defining the procedure to be observed where it is desired to enjoin an order of the Commission.

The result was that up until the Commerce Court Act suits to enjoin orders of the Interstate Commerce Commission were brought against the Commission as defendant.

Here a digression might be made to state that inasmuch as the orders of the Interstate Commerce Commission can be made only against carriers subject to the Interstate Commerce Act; and since a negative order of the Interstate Commerce Commission cannot be reviewed in the courts (Proctor & Gamble Co. v. U. S., 225 U. S. 282), it follows that the only suits in courts that have been brought to enjoin orders of the Interstate Commerce Commission prior to the filing of this bill have been suits instituted by railroads that

have been ordered by the Commission to do something which they did not want to do and did not believe they could be made to do.

Understanding this practice that prevailed prior to the passage of the Commerce Court Act, the force of Sections 3 and 4 of that Act as above quoted, becomes plain. Whereas prior to the passage of the Commerce Court Act, suits to enjoin orders of the Commission were brought against the Commission as the defendant thereafter instead of naming the Interstate Commerce Commission as the defendant, the United States was to be named as defendant, with the result that the control of the litigation would be with the Department of Justice instead of with the Interstate Commerce Commission. This change was thought to be necessary because the direction of defenses by the different government departments should be concentrated under the control of the chief law officer of the federal government, namely, the Attorney-General.

The important thing is that Sections 3, 4 and 5 nor any other section of the Commerce Court Act nor the Judicial Code provisions 200 to 214 inclusive, did not create a right of action against the United States, but simply provided a routine under which the title United States should be substituted in place of the title Interstate Commerce Commission simply as a matter of procedure.

These provisions are not comparable to those other provisions in the law in which the United States permits itself to be sued in cases where the judgment would run against it for recoveries against it.

As specifically referred to in the District Court Jurisdictional Act, these provisions relate to pro-

cedure solely, and it is only as matters of procedure that they are retained by the District Court Jurisdictional Act.

There is certainly all the difference in the world between legislation creating a right of action against the United States and legislation simply providing that in cases which under the law are already recognized as being proper against an administrative branch of the Government such as the Interstate Commerce Commission, instead of being filed in the name of that branch shall thereafter be filed in the name of the United States. In one instance, rights are created; in the other instance, only rules of routine or procedure are prescribed.

No right of action against the United States was created by any provision of the Commerce Court Act or Judicial Code which had not theretofore existed. The simple change in designation from Interstate Commerce Commission to United States is a change in a matter of title only and does not create any new substantive rights against the United States.

In Louisville Cement Co. v. I. C. C. 246 U. S. 638, a shipper affected adversely by an order of the Commission dismissing its complaint, successfully pursued a suit for mandamus against the Commission and the suit it will be noted was brought not against the United States but against the Interstate Commerce Commission though it was a suit to "annul, set aside" the order of the Commission refusing to entertain jurisdiction and dismissing the complaint.

VI

It is uncertain under the wording of Article III, Chapter 2 of the Federal Constitution whether the

original jurisdiction of this Court to try suits by a state against citizens of another State or States is exclusive.

This uncertainty was considered by this Court in Ames v. Kansas, 111 U. S. 449, where at page 464 it was said:

> "The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances or to deprive an ambassador, public minister or counsel of the privilege of suing in any court he chose, having jurisdiction of the parties and the subject-matter of his action would be, in many cases, to convert what was intended as a favor into a burden * * * With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and except, also, between a State and citizens of other States or aliens; in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens."

In U. S. v. Louisiana 123 U. S. 32 it was held following the Ames case, that a State was not precluded by this provision of the Constitution from bringing a suit in the Court of Claims.

If the original jurisdiction of this Court is not exclusive over suits by a State against citizens of another state, then Congress having created a jurisdiction in the District Courts to annual orders of the Interstate Commerce Commission, it would have been possible for the State of North Dakota to have brought this suit in a District Court of competent jurisdiction although as a matter of fact it is a suit by a State against citizens of another State.

If the suit had been brought in a District Court, then all the requirements of precedure incident to the arresting of the jurisdiction of such a court as prescribed in the District Court Jurisdictional Act would have had to have been observed, and pursuant to such procedure requirements, the United States would have had to have been made a party. This was what was held by this Court and all that was held on this point in Illinois Central R. R. Co v. Public Utilities Commission, 245 U. S. 493.

At the most, the District Court Jurisdictional Act created a jurisdiction in the U. S. District Courts which as respects suits by a State against citizens of other States, is simply concurrent with the original jurisdiction of this Court under Article III, Chapter 2 of the Federal Constitution.

VII

It seems that this case presents an ideal situation of a suit by a State against citizens of another State. It just happens that every railroad against whom the injunction must run (and this includes every necessary party as that term is defined by this Court quoting from Shields v. Baum, 17 How. 130, in Minnesota v.

Northern Securities Co. 184 U. S. at page 236) is a citizen of a State other than North Dakota.

Can the District Court Jurisdictional Act, an Act of Congress, providing that cases in the District Courts which but for its provisions would be brought against the Interstate Commerce Commission, shall thereafter be brought against the United States, be so interpreted by this Court as constituting the United States a necessary party to this suit in the sense that term is defined in Minnesota v. Northern Securities Co., *supra?* Can an Act of Congress intended to operate solely as a matter of procedure to be observed in District Courts be interpreted so as to operate to defeat a jurisdiction vested by the Constitution in the sovereign States of the nation to bring their controversies with citizens of other States originally in this Court? Would not such an interpretation render the Act itself unconstitutional?

We submit that Congress may not by statute change the form of an action otherwise one between a State and citizens of another State cognizable by this Court upon original bill, so as to divest the State of its constitutional right to proceed originally in this Court.

For reasons of comity between the State and Federal sovereignties, as a matter of judicial policy, any doubt as to the matter should be resolved in favor of the right of the State to proceed originally in this Court for as said by this Court in Ames v. Kansas *supra*, at page 464 in referring to the right of States and ambassadors to sue originally in this Court:

> "So much was due to the rank and dignity of those for whom the provision was made."

We submit that the Motion to Dismiss should be denied.

Respectfully submitted,

KARL KNOX GARTNER,
Special Counsel for the State of North Dakota,
701-706 Woodward Building,
Washington, D. C.

Of Counsel:
SVEINBJORN JOHNSON,
Attorney General,
State of North Dakota.

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WM. R. STANSBU
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 25 Original.

STATE OF NORTH DAKOTA, EX. REL., WILLIAM LEMKE, ATTORNEY GENERAL,
Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, AND NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

ADDITIONAL SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS.

On the oral argument Mr. Justice McReynolds put the question, whether before legislation touching railway rates, before there was any Commerce Commission, a state might have filed a bill to restrain a carrier from putting in alleged extortionate rates.

I could not and cannot say that in a case otherwise properly grounded a state might not once have had such a remedy in this Court.

There was once a right at law to try out a carrier's charge before a jury, which resulted that a carrier would charge as many rates as there were juries. Mr. Justice Miller saw the absurdity of this when he said in *Chicago & C. Ry. Co.* vs. *Minnesota* 134 U. S. 418. 460, that the proper, if not the only mode, of judicial review of rates was by bill in Chancery.

Either remedy (except as confiscation of property may be the inquiry) is crude, and archaic, in no way adapted to modern advances in commerce or in the laws applicable thereto.

No one now can go originally into a court either of law or equity to complain of a carrier's rate. He must go to the Commission which has been established.

This is true, we submit, of states and of ambassadors.

And thus is shown how legislation, not directly operating on the original jurisdiction of this Court, has yet affected it indirectly, by changes in substantive law.

At least, inasmuch as this Court settles from time to time the principles which it will apply to its own original jurisdiction, the Court, if it is a question of discretion, should leave the making of rates to the Commission, and leave the Commission's decisions to be reviewed in the improved and enlightened manner now provided by Congress.

December 6, 1922.

CHARLES W. BUNN

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

STATE OF NORTH DAKOTA, EX REL., William Lemke, Attorney General, plaintiff. *v.* CHICAGO & NORTH WESTERN RAILWAY Company et al.	No. 25, Original.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

In *Ex parte No. 74*, Increased Rates 1920, 58 I. C. C. 220, the Interstate Commerce Commission authorized general freight rate increases, Eastern Group, 40 per cent; Southern Group, 25 per cent; Western Group, 35 per cent; Mountain-Pacific Group, 25 per cent; all passenger fares, rates on excess baggage, and rates on milk and cream, 20 per cent; and a surcharge of 50 per cent of the charge for space in sleeping and parlor cars.

The bill is brought against five trunk line carriers operating in the State of North Dakota.

By an amendment the State alleges that it is directly affected by the order of the Commission in that it owns and operates a flour mill and grain elevator of 2,000,000 bushels capacity at Drake; a 3,000-

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barrel flour mill at Grand Forks, in addition to fifteen penal and educational institutions at different points; that in connection with the operation of these enterprises it is a shipper of merchandise, etc., for which it pays freight charges; moreover, that the State has many officers and employees whose official duties require them to travel at the State's expense.

The prayer is for "appropriate process restraining the defendants named herein *from applying the said order* of the Interstate Commerce Commission increasing the intrastate rates, fares, and charges of North Dakota until such time as this court can review the decision of the Interstate Commerce Commission," etc.

If the relief is granted, the order may not become effective. It is a suit to suspend the order. *Baltimore & Ohio Railroad* v. *Lambert Run Coal Co.*, 267 Fed. Rep. 776.

The Commerce Court Act, approved June 18, 1910, provides (36 Stat. 539):

> The Commerce Court shall have the jurisdiction possessed by the circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:
>
> First. * * *
>
> Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.
>
> Third. * * *
>
> Fourth. * * *

> The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above enumerated classes. (36 Stat. 540.)
>
> Except as may be otherwise provided in this act, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a circuit court of the United States. (36 Stat. 542.)

The Commerce Court Act further provides (36 Stat. 542):

> That *suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States.* * * * That the Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. (36 Stat. 543.) * * * *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party;

> and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this act, * * * may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General (36 Stat. 543).

Urgent Deficiencies Act, approved October 22, 1913 (which abolished the Commerce Court), provides (38 Stat. 219):

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the

venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office * * *.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court (38 Stat. 220). * * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case if such appeal be taken within thirty days after the order, in respect to

> which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, *and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.*

Machinery is thus amply provided to hear and determine a suit "to enjoin, set aside, annul, or suspend" any order of the Interstate Commerce Commission. There is express provision that such a suit shall be brought against the United States. The statute deals with a subject matter and jurisdiction, practice, and procedure—not with parties. The relation of the State to these orders is not one whit different from that of any other interested party. The mere fact that the State makes the complaint does not suspend all of the statutes on jurisdiction, practice, and procedure. As the jurisdiction of the district court is *exclusive*, as the suit must be brought against the United States, and as the standing of the State is not above that of any other interested party, the jurisdiction fails.

In *American Express Co.* v. *Caldwell*, 244 U. S. 617, 628, the suit was instituted in the Supreme Court of South Dakota. The jurisdiction was challenged because of "an attack upon an order of the Interstate Commerce Commission." In sustaining the jurisdiction the Supreme Court of the United States said:

> If this were a proceeding professedly "to enjoin, set aside, annul, or suspend" an order of the Commission "in whole or in part," a state court would obviously have no jurisdiction. *The bill does not purport to attack, nor does it even refer to any such order.*

In *Illinois Passenger Fare Cases*, 245 U. S. 493, 505, this court said:

> * * * the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

If the jurisdiction is sustained, this court will not only extend its jurisdiction in such a way as to invite original bills in all cases in which the legislatures, agencies, or officials of the States disagree with those of the Nation regardless of the jurisdiction and procedure provided for by statute in the district courts, but the court will at the same time in effect repeal the statute which provides "that the Attorney General

shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court (36 Stat. 543), and the United States will cease "to stand in judgment as representing the public."

The fact that the State filed the bill of course does not submerge the statutes fixing the jurisdiction and procedure of the district courts over the subject-matter. The course of the State in suing the carriers, against whom the order was directed, and not the United States as provided by statute, by an original bill in this court is self-annihilating.

In *United States* v. *Louisiana*, 123 U. S. 32, 37, this court, speaking through Mr. Justice Field, said:

> Having consented to be sued in the Court of Claims (in the instant case in the District Court), upon any claim founded upon a law of Congress (in the instant case a suit to set aside an order of the Commission), there is no more reason why the jurisdiction of the court (in the instant case the District Court) should not be exercised when a State is a party than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.

The court is without jurisdiction and the bill should be dismissed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

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Office Supreme Court, U. S.
FILED
OCT 4 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

No. 25 Original.

STATE OF NORTH DAKOTA, ex rel, **WILLIAM LEMKE, ATTORNEY GENERAL**, Plaintiff,

vs.

CHICAGO & NORTHWESTERN RAILWAY CO., et al, Defendants.

MOTION FOR INTERLOCUTORY INJUNCTION.

Now comes the State of North Dakota by her counsel herein and moves the Court for an interlocutory injunction herein and for cause therefor states:

That by its order of May 31, 1921, this Court has permitted the said State of North Dakota to file its Original Bill and amendments thereto seeking the entry of an order by this Court permanently enjoining the carriers named in said Original Bill from executing a certain order of the Interstate Commerce Commission entered May 9, 1920; that in said Original Bill, the

State of North Dakota prayed that this Court enter an order temporarily restraining the defendant carriers from executing said order pending its suit upon the Original Bill; that the Court in its order of May 31, 1921, denied so much of the State of North Dakota's prayer for relief as went to the entry of an interlocutory order for a temporary injunction.

That the said order of the Interstate Commerce Commission by its terms became effective June 10, 1921; that said order required the defendant carriers herein to increase by 35% all of the rates, fares and charges applicable intrastate within the State of North Dakota; that from and since said June 10, 1921, said increases have been made effective and that since that time the citizens of the State, as well as the State itself, has had to pay the increased rates, fares and charges required by said order; that as set forth in its Original Bill herein in paragraph XIII the carriers defendant hereto prior to the commencement of the action before the Interstate Commerce Commission, to wit, on November 6, 1920, filed a petition with the Board of Railroad Commissioners for the State of North Dakota seeking to make an increase of 35% effective in their rates, fares and charges applicable intrastate within the State; that pursuant to such petition the said Commission entered upon an investigation of the said rates, fares and charges and pursuant to the provisions of the Railroad Act of North Dakota governing the making of intrastate rates, fares and charges within said state, the said North Dakota Railroad Commission on the 14th day of December, 1920, issued an order and findings upon said investigation denying said petition because the evidence and exhibits introduced by the carriers did not warrant

the increases, whereas the evidence and exhibits submitted on behalf of the State showed that the return to the petitioning roads from their intrastate operations amounted to several million dollars in excess of 6 per centum upon the value of the property of the petitioners within that state; that under the decisions of this court, the rates fixed by the duly appointed state agency are presumptively reasonable. (Minnesota Rate Cases, 234 U. S. 352; North Dakota Lignite Coal Case, 236 U. S. 585). That the rates, fares and charges applicable intrastate within the State of North Dakota prior to the effectiveness of the said order of the Interstate Commerce Commission are reasonable per se and presumptively so and that the State of North Dakota is entitled at the hands of this court to have the status quo preserved during the pendency of the litigation before this court designed to test the constitutionality of the order of the Interstate Commerce Commission, the constitutionality of which is raised by the allegations of its Original Bill which it has been permitted to file by the order of this court of May 31, 1921; that the status quo cannot be preserved save by this court entering an order requiring the carriers defendant herein to cease and desist forthwith from exacting rates, fares or charges intrastate within the State of North Dakota which exceed the rates, fares and charges that were in effect in that State prior to the entry of the said order of the Interstate Commerce Commission.

WHEREFORE, the State of North Dakota renews its motion for a temporary restraining order herein and prays this court to enter an order for an interlocutory injunction, temporarily restraining the carriers defendant herein from henceforth and pending

the further order of this court, exacting, demanding or collecting rates, fares and charges for transportation intrastate within the state of North Dakota which exceed the rates, fares and charges applicable intrastate in said state prior to May 9, 1920, the date of the said order of the Interstate Commerce Commission.

Respectfully submitted,

WILLIAM LEMKE,
Attorney General,
and
KARL KNOX GARTNER,
Special Counsel
for the State of North Dakota.

Karl Knox Gartner being first duly sworn states that the matters alleged herein are true to the best of his information and belief.

KARL KNOX GARTNER.

Subscribed and sworn to before me this 26th day of September, 1921.

C. LARIMORE KEELEY,
Notary Public.

My commission expires March 2, 1925.

Office Supreme Court, U.
FILED
DEC 27 1921
WM. R. STANSBU
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 25 Original.

STATE OF NORTH DAKOTA, ex rel., WILLIAM LEMKE, Attorney General,

Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

BRIEF ON MOTION TO DISMISS BILL.

CHARLES W. BUNN,
ERASMUS C. LINDLEY,
DENNIS F. LYONS,
BENJAMIN W. SCANDRETT,
Solicitors for Defendants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

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STATE OF NORTH DAKOTA, ex rel., WILLIAM LEMKE, Attorney General,

Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

BRIEF ON MOTION TO DISMISS BILL.

At the last term an order was entered on June 18 that the above named defendants appear before the Court on Monday, October 3, 1921, to answer unto a bill of complaint of the State of North Da-

kota exhibited against the said defendants on relation of William Lemke, Attorney General. On the same day leave was granted the State to file its bill. The defendants conceive that the Court is without jurisdiction to entertain the bill and to proceed to a decree thereon; this for the following reasons:

I.

This is a suit to enjoin defendants, that is all the railway companies doing business in North Dakota, from executing an order of the Interstate Commerce Commission. Therefore it is a case brought to enjoin, set aside, annul, or suspend an order of the Commission falling within Section 207, Judicial Code.

The bill is printed and the pages herein referred to are the pages of this print. It first pleads the order of the Commission in the case called Ex Parte 74, and attaches the same as Exhibit A. This is the order for country-wide increases in interstate rates (Bill, pp. 4, 5).

It next pleads the subsequent order of the Commission, attached as Exhibit B, for increases in local North Dakota rates to bring them to the basis of the increased interstate rates (Bill, pp. 4, 5).

The bill (p. 5) alleges that any difference in level between interstate rates and previous North Dakota local rates was caused solely by the increased interstate rates ordered by Exhibit A (Bill, pp. 5, 6).

It next alleges that the increases ordered in Exhibit A were illegal and hence could not validly operate to create an unjust discrimination justifying order Exhibit B (Bill, p. 6).

The bill then proceeds to set out reasons why the order Exhibit A is invalid (Bill, p. 7 and following), the main reasons alleged being that the Commission was required by the law to make a physical valuation before the order, which it did not do (Bill, pp. 8, 9); that for want of such valuation the order Exhibit A is arbitrary and without due process and so illegal; that the increases of rates in Exhibit A were not founded upon the evidence before the Commission (Bill p. 10); that the North Dakota Commission on application refused the increases in state rates for reasons stated (Bill, pp. 12-14); that the rates ordered by Exhibit B are so high, compared with interstate rates and Minnesota rates that the jobbers of North Dakota will not be able to compete (Bill, pp. 16-18); and that the Interstate Commerce Commission in making the orders acted on a misinterpretation of the Commerce Act and went beyond the powers conferred by that act (Bill, pp 16-18).

Neither the Commission nor the United States is made a party defendant, the railway companies being the only defendants. The prayer of the bill is that the railway companies be restrained from applying the order of the Interstate Commerce Commission, Exhibit B.

That the suit is one of those described in Sec. 207, Judicial Code, as "brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission" is beyond question. This was settled by *Illinois Central Railroad Co. v. Public Utilities Commission,* 245 U. S. 493. That case was brought by certain carriers in the District Court for the Northern District of Illinois to enjoin the state authorities from obstructing the carriers in obeying an order of the Interstate Commerce Commission prescribing passenger fares within the State of Illinois. Cross bills were filed attacking the validity of the Commission's order, praying that it be set aside, and that the carriers be enjoined from acting upon it. In discussing the cross bills, this Court said:

> "Passing the fact that they were presented as cross bills, it is apparent that in subject-matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, Secs. 208, 211; c. 32, 38 Stat. 219-220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn v. United States*, 123 U. S. 227, 232-233; *Schillinger v. United States*, 155 U. S. 163, 166. It there-

fore is certain that the cross bills could not be entertained in the Northern District of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross bill and an original bill. No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see *Denver v. New York Trust Co.*, 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 How. 386; *Reeside v. Walker*, 11 How. 272, 290; *DeGroot v. United States*, 5 Wall. 419, 431-433; *Carr v. United States*, 98 U. S. 433, 437; *Belknap v. Schild*, 161 U. S. 10, 16. Thus the cross bills as such had no better standing than they would have had as original bills.

The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief

along that line they should have resorted to the court empowered by law to entertain a suit of that nature."

II.

By statute it is required that the suit must be brought against the United States and in a certain District Court. An original suit, therefore, will not lie in this Court where a State cannot sue the United States.

Section 207 of the Code gave the Commerce Court exclusive jurisdiction over cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. The Act of October 22, 1913 (Chapter 32, 38 Stat. 219) transferred this exclusive jurisdiction to the several District Courts of the United States. That Act also provides that with certain exceptions such suits must be brought in the Judicial District "wherein is the residence of the party or any of the parties upon whose petition the order was made." Section 208 of the Code requires that suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought against the United States. The Code, in addition to requiring that all such suits shall be against the United States, provides in Section 212 that the Attorney General shall have charge and control of the interests of the Government in all such cases.

The Act of October 22, 1913, to which reference has already been made, provides that no interlocutory injunction suspending or restraining the enforcement of an order of the Interstate Commerce Commission shall be issued unless the application therefor shall be heard and determined by three judges. It also provides that such an application shall not be heard before at least five days' notice has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and such other persons as may be defendants in the suit. In cases of irreparable damage, a majority of the three judges may on three days' notice allow a temporary stay for not more than sixty days. Provision is made for a direct appeal to this Court from any order granting or denying such an interlocutory injunction and also from any final judgment or decree of the District Court in such a case. That Congress in creating the Commerce Court evidenced an intention to confine the jurisdiction of this court in cases involving orders of the Interstate Commerce Commission to its appellate jurisdiction, was recognized in the case of *United States v. Baltimore & Ohio Railroad Co.*, 225 U. S. 306. It is there stated:

> "It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the

> statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way."

The fact that the party seeking to enjoin the enforcement of the order of the Interstate Commerce Commission is the State of North Dakota does not make inapplicable the statutory provisions requiring that such a suit be brought against the United States in the District Court. It was settled as early as the case of *Ames v. Kansas*, 111 U. S. 449, that the original jurisdiction of the Supreme Court in cases where a state is a party is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a state to be brought in the inferior courts of the United States. It is also well settled that the United States cannot be sued without its consent (*Kansas v. United States*, 204 U. S. 331). From this it necessarily follows that the United States can only be sued in those courts that are within the consent given (*United States v. Louisiana*, 123 U. S. 32; *Illinois Central Ry. Co. v. Public Utilities Commission*, 245 U. S. 493). It is true that Section 233 of the Code declares that:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of another state, or aliens, in which

> latter cases it shall have original, but not exclusive jurisdiction."

In the case of *United States v. Louisiana, supra*, the Court, after pointing out that the above declaration was a part of the Judiciary Act of 1789, states:

> "This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none."

It is not questioned that the original jurisdiction of this Court is conferred by the Constitution, and that consequently Congress cannot take it away. But unless the United States consents to be sued

in this Court, that jurisdiction does not comprise suits against the United States whose consent to be sued is precedent to the jurisdiction of any court. Direct attack on the orders of the Interstate Commerce Commission is provided for in the statutes by an action to which the United States is a party and the Commission directly represented by the Attorney General. This suit, to which the United States cannot be made a party, is a direct attack on the orders of the Commission without the presence of the indispensable defendant.

Plaintiff says it has the constitutional right to invoke the jurisdiction of this Court, but this statement is superficial. The State has no constitutional right to sue the United States in any court. It cannot be doubted that the interest of the United States in the rates and service of public carriers, and particularly in the workings of such a public tribunal as the Interstate Commerce Commission, is such as to warrant Congress in requiring that the United States shall be the defendant in every suit to set aside or annul an order of the Commission. This was decided in *Illinois Central Railroad Co. v. Public Utilities Commission*, *supra*, where the court said:

> "As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to

> the court empowered by law to entertain a suit of that nature."

The power of Congress never has been doubted to create special tribunals with full jurisdiction over any subject in which the United States are interested, and to give the decisions of such tribunals the effect which Congress may prescribe, and to make them unreviewable in the courts except in such manner as Congress may determine. *United States v. California etc. Land Co.*, 148 U. S. 31, 43, 44. Congress has made the orders of the Commerce Court reviewable only in a certain manner. Its right to provide this exclusive method of review, so far as we can discover, never has been doubted. The sole judicial review of such orders is in the District Courts unless the act of Congress is to be held unconstitutional.

III.

Answer to the brief filed on behalf of the State.

1. The statement in that brief that Sections 208 and 209, Judicial Code, formed part of the Commerce Court Act of 1910 gives a wrong impression.

These sections originated in that act, but were re-enacted in the Judicial Code act of March 3, 1911, effective January 1, 1912.

The abolition of the Commerce Court in appropriation bill of October 22, 1913 (38 Stat. p. 219),

abolished only the Court and transferred its jurisdiction to the District Courts. It did not amend the Judicial Code act. It fixed the venue of actions to enforce, suspend or set aside orders of the Commerce Commission and did not change Sec. 208, Judicial Code, requiring such actions to be brought against the United States. This was expressly decided by *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493 (see p. 504).

2. Plaintiff's brief involves (while it does not expressly state) an untenable assumption; viz., that this suit is not one to set aside an order of the Commission. The contention rests on the suit being brought against carriers, neither the United States nor the Commission being made defendant. But the bill assails the validity of the Commission's order and seeks to enjoin defendant carriers from complying with it on the ground that the order is null and void. This makes it a suit to annul the order of the Commission. *Illinois Central Railroad Co. v. Public Utilities Commission* (see p. 504). There the cross bills, considered as bills against the carriers only, were held suits to set aside and annul the order of the Commission.

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Solicitors for Defendants.

Supreme Court, U. S.
FILED
OCT 3 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

No. 25 Original.

STATE OF NORTH DAKOTA, ex rel., WILLIAM LEMKE, Attorney General, *Plaintiff*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, *Defendants*.

MOTION FOR LEAVE TO FILE MOTION TO DISMISS THE BILL OF COMPLAINT.

Now come the defendants above named and ask leave to file a motion to dismiss the plaintiff's original bill of complaint and to have said motion set down for oral hearing as the Court may direct. The objections urged against the bill go to the jurisdiction of the Court and are set forth in the brief attached and herewith submitted.

CHARLES W. BUNN,
ERASMUS C. LINDLEY,
DENNIS F. LYONS,
BENJAMIN W. SCANDRETT,
Solicitors for Defendants.

IN THE

Supreme Court of the United States.

No. 23 Original.

STATE OF NORTH DAKOTA, ex rel., WILLIAM LEMKE, Attorney General,

Plaintiff,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

BRIEF.

At the last term an order was entered on June 18 that the above named defendants appear before the Court on Monday, October 3, 1921, to answer unto a bill of complaint of the State of North Dakota exhibited against the said defendants on relation of William Lemke, Attorney General. On the same day leave was granted the State to file its bill. The defendants conceive that the Court is without jurisdiction to entertain the bill and to proceed to a decree thereon; this for the following reasons:

THIS IS A SUIT TO ENJOIN DEFENDANTS FROM EXECUTING AN ORDER OF THE INTERSTATE COMMERCE COMMISSION. BY STATUTE ALL SUCH SUITS MUST BE BROUGHT AGAINST THE UNITED STATES AND IN CERTAIN DESIGNATED DISTRICT COURTS. AN ORIGINAL SUIT, THEREFORE, WILL NOT LIE IN THIS COURT WHERE A STATE CANNOT SUE THE UNITED STATES.

Section 207 of the Code gave the Commerce Court exclusive jurisdiction over cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. The Act of October 22, 1913 (Chapter 32, 38 Stat. 219) transferred this exclusive jurisdiction to the several District Courts of the United States. That Act also provides that with certain exceptions such suits must be brought in the Judicial District "wherein is the residence of the party or any of the parties upon whose petition the order was made." Section 268 of the Code requires that suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought against the United States. The Code, in addition to requiring that all such suits shall be against the United States, provides in Section 212 that the Attorney General shall have charge and control of the interests of the Government in all such cases.

The foregoing statutory provisions were considered in the case of *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493. That

case was brought by certain carriers in the District Court for the Northern District of Illinois to enjoin the state authorities from obstructing the carriers in obeying an order of the Interstate Commerce Commission prescribing passenger fares within the State of Illinois. Cross bills were filed attacking the validity of the Commission's order, praying that it be set aside, and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. In discussing the cross bills, this Court said:

> "Passing the fact that they were presented as cross bills, it is apparent that in subject-matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, Secs. 208, 211; c. 32, 38 Stat. 219-220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn v. United States*, 123 U. S. 227, 232-233; *Schillinger v. United States*, 155 U. S. 163, 166. It therefore is certain that the cross bills could not be entertained in the Northern District of Illinois, unless in this regard there be, as is asserted, a valid distinction between a cross bill and an original

bill. No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained (see *Denver v. New York Trust Co.*, 229 U. S. 123, 135, and cases cited); but it is otherwise where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills, or between ancillary suits and original suits, but extends to suits of every class. *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 How. 386; *Reeside v. Walker*, 11 How. 272, 290; *DeGroot v. United States*, 5 Wall. 419, 431-433; *Carr v. United States*, 98 U. S. 433, 437; *Belknap v. Schild*, 161 U. S. 10, 16. Thus the cross bills as such had no better standing than they would have had as original bills.

The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature."

The Act of October 22, 1913, to which reference has already been made, provides that no interlocutory injunction suspending or restraining the enforcement of an order of the Interstate Commerce Commission shall be issued unless the application therefor shall be heard and determined by three judges. It also provides that such an application shall not be heard before at least five days' notice has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and such other persons as may be defendants in the suit. In cases of irreparable damage, a majority of the three judges may on three days' notice allow a temporary stay for not more than sixty days. Provision is made for a direct appeal to this Court from any order granting or denying such an interlocutory injunction and also from any final judgment or decree of the District Court in such a case. That Congress in creating the Commerce Court evidenced an intention to confine the jurisdiction of this court in cases involving orders of the Interstate Commerce Commission to its appellate jurisdiction, was recognized in the case of *United States v. Baltimore & Ohio Railroad Co.*, 225 U. S. 306. It is there stated:

> "It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the

> statute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitancy where there has been an abuse of discretion to correct it in the completest way."

The fact that the party seeking to enjoin the enforcement of the order of the Interstate Commerce Commission is the State of North Dakota does not make inapplicable the statutory provisions requiring that such a suit be brought against the United States in the District Court. It was settled as early as the case of *Ames v. Kansas*, 111 U. S. 449, that the original jurisdiction of the Supreme Court in cases where a state is a party is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a state to be brought in the inferior courts of the United States. It is also well settled that the United States cannot be sued without its consent (*Kansas v. United States*, 204 U. S. 331). From this it necessarily follows that the United States can only be sued in those courts that are within the consent given (*United States v. Louisiana*, 123 U. S. 32; *Illinois Central Ry. Co. v. Public Utilities Commission*, 245 U. S. 493). It is true that Section 233 of the Code declares that:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of another state, or aliens, in which

latter cases it shall have original, but not exclusive jurisdiction."

In the case of *United States v. Louisiana, supra*, the Court after pointing out that the above declaration was a part of the Judiciary Act of 1789, states:

> "This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the Circuit Court, or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none."

If, when enacted, this section had given this Court original and exclusive jurisdiction of a suit by a state against the United States, it would not have restricted the application of the present stat-

ute which requires that all suits against the United States to enjoin orders of the Interstate Commerce Commission be brought in the District Court.

It is not questioned that the original jurisdiction of this Court is conferred by the Constitution, and that consequently Congress cannot take it away. But unless the United States consents to be sued in this Court, that jurisdiction does not comprise suits against the United States whose consent to be sued is precedent to the jurisdiction of any court. Direct attack on the orders of the Interstate Commerce Commission is provided for in the statutes by an action to which the United States is a party and the Commission directly represented by the Attorney General. This suit, to which the Commission cannot be made a party, is an attempt to attack the order collaterally.

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